In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported in 464 F.2d 1358. The opinions of the district court (Pet. App. C and D) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 2, 1972. The petition for a writ of certiorari was filed on October 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the actions of the Hackensack Meadowlands Development Commission, in attempting to prohibit the construction of a liquified natural gas storage facility certificated by the Federal Power Commission, constituted an impermissible interference with interstate commerce.

2. Whether a certificate of public convenience and necessity issued by the Federal Power Commission pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f, is subject to collateral attack on the ground that the Commission failed to prepare an environmental impact statement.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, are set forth at pp. 3-5 of the petition.

STATEMENT

1. Transcontinental Gas Pipe Line Corporation ("Transco") owns and operates an extensive interstate pipeline system for the transportation of natural gas. In February 1963, Transco purchased 500 acres of meadowlands from the Borough of Carlstadt, New Jersey, on which to construct facilities for the processing and storage of liquified natural gas ("LNG") (Pet. App. 3a). Pursuant to certificates of public convenience and necessity issued by the Federal Power Commission under Section 7 of the Natural Gas Act, 15 U.S.C. 717f, and building and storage permits issued by the Borough of Carlstadt, Transco constructed,

first, processing and underground storage facilities and, later, an above-ground storage container. These facilities are currently in operation (*ibid.*).

In the fall of 1969, Transco was advised by its customers that they would require additional LNG service during the winter of 1971-1972. To meet the additional needs, Transco applied to the Commission on December 17, 1969, for authorization to construct and operate a second above-ground storage container. Notice of the application was duly published, 35 Fed. Reg. 343,[1] and numerous customers of Transco intervened in support of the proposal. On March 12, 1970, the Commission issued a certificate authorizing construction of the second above-ground container (Pet. App. 5a).[2]

Prior to Transco's filing of the application for the second above-ground container, the Hackensack Meadowlands Reclamation and Development Act (N.J.S.A. 13:17-1 *et seq.*) was passed by the State of New Jersey and approved as law on January 13, 1969. Pursuant to the Act, the Hackensack Meadowlands Development Commission ("HMDC") was created with the power and responsibility to prepare, adopt, and implement a master plan for the development of all lands lying within the Hackensack Meadowlands District. The Act also provides that a permit should be obtained from

---

[1] In addition to public notice, special notice was given to the governor and the Public Service Commission of the State of New Jersey.

[2] Appropriate permits for the second above-ground container were issued to Transco by the Borough of Carlstadt and the Federal Aviation Administration.

HMDC prior to the commencement of any construction on any land covered by a master plan. Transco applied to the HMDC for a building permit for its proposed facility, but HMDC refused to issue a permit on the ground that the construction and operation of the LNG facilities is not a permitted use under its master plan (Pet. App. 5a-6a).[5]

2. Upon the denial of a permit by HMDC, Transco brought this action in the United States District Court for the District of New Jersey seeking an order restraining HMDC from interfering with the construction or operation of the second above-ground container, or, alternatively, requiring HMDC to issue the appropriate permits. Transco alleged that HMDC's failure to permit the construction constituted an unlawful interference with interstate commerce. HMDC denied the allegations of the complaint and counterclaimed to enjoin Transco from commencing construction of the certificated project. HMDC's subsequent motion for summary judgment on the ground that the certificate under which Transco sought to construct the proposed facility was void since the Commission had not complied with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 *et seq.*, was denied (Pet. App. 22a-27a).

After an evidentiary hearing on the merits of the complaint and counterclaim, the district court found in favor of Transco and issued an injunction prohibiting HMDC from interfering with the certificated con-

[5] The portion of the master plan allegedly inconsistent with Transco's project was adopted by HMDC *subsequent* to the issuance of a certificate by the Commission.

struction. The court found that "the requirements set forth by the HMDC relating to the construction of the proposed LNG storage facility are unreasonable, arbitrary, and act as an unjustified interference with interstate commerce as represented here by a Natural Gas Company in possession of a certificate of public convenience and necessity" (Pet. App. 35a).

On appeal, the court of appeals noted that it was required to "look to the particular facts presented by this case to determine whether the [Meadowlands] Commission's complete interdiction of the proposed facility was a reasonable exercise of its police powers, or as the District Court determined, an 'arbitrary, unreasonable and unjustifiable interference' with interstate commerce" (Pet. App. 8a). After reviewing the particular facts, including the needs of the New York-New Jersey metropolitan area for an adequate gas supply, the court of appeals upheld the district court's conclusion that HMDC had unjustifiably interfered with interstate commerce (Pet. App. 7a-13a). The court also held that the Federal Power Commission, in issuing Transco a certificate for the second above-ground storage container, was not required to issue an environmental impact statement under Section 102 of NEPA (Pet. App. 14a-19a).[4]

---

[4] As the court of appeals noted (Pet. App. 17a-18a), Transco's application was filed with the Commission prior to the effective date of NEPA and the certificate was issued only two and one-half months after the effective date. The Interim Guidelines of the Council on Environmental Quality, interpreting the Act, were not issued until April 30, 1970 (35 Fed. Reg. 7390)—more than one month after the certificate was issued.

INTEREST OF THE FEDERAL POWER COMMISSION

The Federal Power Commission is charged with the responsibility of administering the Natural Gas Act, 15 U.S.C. 717 *et seq.* In granting Transco a certificate under Section 7 of the Act to construct a second above-ground LNG storage container, the Commission necessarily concluded that the construction of the container was in the public interest. In defending Transco's suit, petitioner seeks to block construction of the container and, to that end, collaterally attacks the Commission's order issuing the certificate. The Commission participated as *amicus curiae* in the courts below and is participating in this Court to defend its order and to urge that petitioner not be permitted to interfere with the construction of the above-ground container.

ARGUMENT

The decision of the court below, which essentially turns on the facts of this particular case, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends that "existing precedents leave substantially unsettled questions as to what extent and in what degree local governmental authorities are empowered to exercise their authority over activities certificated under the Natural Gas Act" (Pet. 10). The law regarding the extent of permissible local authority, however, is well settled and was correctly summarized in the court of appeals' opinion (Pet. App. 7a-8a):

> It is well established that the interstate transmission and sale of natural gas is within the

> regulatory ambit of the Commerce Clause of the Constitution. *Commonwealth of Pennsylvania* v. *State of West Virginia*, 262 U.S. 253 (1950); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). Although the states are not precluded from imposing reasonable restraints and restrictions on interstate commerce, and although the authority to enact zoning ordinances under the state's police power is clear, see, *e.g.*, *Village of Euclid Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), it is equally settled that a state may not exercise that police power where the necessary effect would be to place a substantial burden on interstate commerce. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). [Footnote omitted.]

The courts below correctly applied these familiar principles to the facts of this case and properly concluded that the actions of HMDC unreasonably interfered with interstate commerce. Without invoking any specific regulation of its own, HMDC seeks through this litigation to prohibit the construction of certificated facilities which are undeniably part of Transco's interstate operations and which are necessary to meet the pipeline's commitment to provide its New York-New Jersey customers with an adequate gas supply. Under all the circumstances, including the fact that the initial LNG processing and storage facilities were constructed prior to the establishment of HMDC, HMDC's conduct exceeds the permissible bounds of local police power. See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 779.

2. Petitioner asserts (Pet. 11-14) that the Federal Power Commission failed to comply with NEPA in issuing a certificate for the storage facility and that the decision below upholding the Commission's action is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109. Petitioner, however, did not intervene in the certificate proceedings before the Commission and did not seek direct judicial review of the Commission's order issuing the certificate. Since the Commission in issuing the certificate was clearly acting within its jurisdiction under Section 7 of the Natural Gas Act, its order is not now subject to collateral attack by petitioner. See *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117.

In any event, the decision below that the Commission in the particular circumstances of this case was not required to file an environmental impact statement is correct and does not conflict with the decision in *Calvert Cliffs*. To begin with, NEPA requires a detailed environmental impact statement *only* in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In the present case, unlike *Calvert Cliffs*, the court of appeals was unable to find that a "major Federal action" was involved (see Pet. App. 18a). Second, the court of appeals noted that in cases such as this one involving a Commission order issued only two and one-half months after the effective date of NEPA, "a flexible approach to NEPA should be taken" (Pet.

App. 17a). In *Calvert Cliffs*, the District of Columbia Circuit acknowledged that NEPA does not impose an "inflexible timetable" (449 F.2d at 1119) and stated:

> No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970. [*Id.* at 1120.]

Finally, *Calvert Cliffs* involved a rulemaking proceeding rather than the issuance of a particular certificate, as here. In *Calvert Cliffs*, the court of appeals expressly noted that "we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license." 449 F.2d at 1115-1116.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

LEO E. FORQUER,
General Counsel,

GEORGE W. MCHENRY, JR.,
Acting Solicitor,
Federal Power Commission.

JANUARY 1973.

☆ U.S. Government Printing Office: 1972—492-185/413